because USSB already has acquired programming from Viacom and Time Warner "with varying degrees of exclusivity to USSB vis-a-vis other DBS providers."[4/] Having already entered into their exclusive arrangement, USSB, Viacom and Time Warner are particularly anxious for the Commission to bless the concept of exclusivity between vertically-integrated cable programmers (such as Viacom and Time Warner) and non-cable distributors (such as USSB).[5/]

4. Because the USSB/Viacom/Time Warner deal involves vertically-integrated cable programmers and not cable operators, USSB/Viacom/Time Warner argue that Congress never intended to prohibit these types of arrangements in the Cable Act.[6/] USSB points to the proposed settlement of the pending Primestar Partners suit brought by 40 State Attorneys General against Primestar Partners, L.P. (including Time Warner) and other cable defendants (including Viacom), as evidence that high-powered DBS providers at the 101° orbital position may lawfully enter into exclusive contracts with cable programming providers. USSB claims that it is "unlikely that 40 states would have agreed to the provisions that recognize such exclusive contracts if there was any question as to whether the Cable Act prohibited such exclusive arrangements."[7/]

4/ Opposition of Viacom, p. 7, note 4. There is no programming exclusivity involved in NRTC's DBS project with Hughes Communications Galaxy, Inc.

5/ See, Opposition of Viacom, p. 7, note 4.

6/ Time Warner implies that Congress has no interest in this issue because "exclusive agreements between programmers and nascent non-cable delivery systems, such as DBS, are quite uncommon." Opposition of Time Warner, p. 6, note 7. They certainly are "uncommon." Once Time Warner and Viacom entered into their exclusive agreements with USSB, they effectively blocked distribution of their programming, including HBO and Showtime, by other DBS providers.

7/ USSB Opposition, p. 6, note 6.

5. The Primestar Partners antitrust suit, however, is hardly evidence of a lack of Congressional interest in prohibiting exclusive arrangements between non-cable distributors and vertically-integrated cable programmers. To the contrary, in the Primestar matter both the Honorable Billy Tauzin, the author of the Program Access amendment to the Cable Act, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and Finance of the House of Representatives, have expressed unequivocal disagreement with the statutory interpretation now put forth by USSB/Viacom/Time Warner and the other parties filing Oppositions to NRTC's Petition.[8] Representative Tauzin and Chairman Markey believe, as does NRTC, that USSB's exclusive arrangement with Viacom and Time Warner is blatantly inconsistent with the Cable Act and will stifle the development of DBS.

6. Representative Tauzin specifically voiced his objection to the proposed sanctioning of DBS exclusives between cable programmers and non-cable distributors. He opposed the proposed Primestar settlement, specifically because it would permit Time Warner and Viacom to enter into exclusive contracts with USSB at the 101° orbital position. He unequivocally stated that such an exclusive arrangement would "undermine both the letter and the spirit of the 1992 Cable Act." (Emphasis added).

---

[8] See, Letter from the Honorable Billy Tauzin, Member of Congress, to the Honorable John Sprizzo, United States District Court, dated June 16, 1993, and Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, to the Honorable Robert Abrams, Attorney General of the State of New York, dated July 1, 1993, attached hereto as Attachments "A" and "B," respectively.

7. Chairman Markey likewise expressed his extreme concern that by sanctioning exclusive arrangements for DBS, the proposed consent decree "enables the Primestar Partners to divide the DBS market for cable programming between one of the two DBS systems and Primestar, excluding the other major DBS provider at 101°.[9] This arrangement is precisely the type of anti-competitive behavior we have legislated against."[10] (Emphasis Added.)

8. It is preposterous for USSB to cite the proposed Primestar settlement as evidence that USSB's exclusive arrangement with Time Warner and Viacom is consistent with the public interest and with Congressional intent in enacting the Cable Act. Clearly, as reflected in the concerns expressed by Representative Tauzin and Chairman Markey, it is neither.[11] Exclusive arrangements in the DBS service are contrary to the statute and should be contrary to the Commission's rules.

---

[9] Chairman Markey specifically noted that his concerns were "not theoretical," because the Primestar Partners and one of the 101° DBS licensees (i.e., USSB) had already entered into their exclusive arrangement.

[10] USSB/Viacom/Time Warner's attempt to justify their exclusive arrangement as being in the public interest (e.g., "at least one DBS distributor will supply Viacom programming to the unwired areas," Viacom Opposition, p. 7, note 4) is contrary to the language of the statute and contrary to the intent of Congress as reiterated by Representative Tauzin and Chairman Markey.

[11] The proposed Primestar settlements are not yet final. On July 16, 1993, NRTC joined with other Amicus Curiae in filing an Opposition to the proposed consent decrees. A copy of the Joint Amicus Curiae Memorandum of Law of Direct TV, Inc., National Rural Telecommunications Cooperative, Consumer Federation of America and Television Viewers of America, Inc. is attached hereto as Attachment "C." Oppositions were also filed by The Wireless Cable Association International, Inc. and a group of common carriers (Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell Corporation, US West, Inc., United States Telephone Association and GTE Service Corporation).

9. In fact, the wording of Section 76.1002(c)(1) of the Commission's rules, which limits application of the rule to "cable operators," appears to be nothing more than an inadvertent drafting error in a long and complex document. The wording of the rule does not reflect the text of the Program Access Decision, supra, at para. 61. The Commission expressly stated in the text that its rule implementing the statutory ban on exclusive arrangements in unserved areas "will prohibit vertically integrated programmers from engaging in activities that result in de facto exclusivity..." (Id., Emphasis added).[12/] Unfortunately, however, the rule adopted by the Commission fails to accomplish this objective. It does not prohibit activities by vertically integrated programmers that result in de facto exclusivity. Instead, it focuses solely on the conduct of cable operators.[13/] Clearly, the wording of the rule is in error.

10. Section 628(c)(2)(C) of the Cable Act, unlike the Commission's implementing rule, does not prohibit only conduct by cable operators. It broadly prohibits practices, arrangements, and activities -- such as the USSB/Viacom/Time Warner deal -- that prevent a multichannel video programming distributor from obtaining programming in areas not served by a cable operator. Should there ever have been any doubt as to the legislative intent behind this explicit statutory prohibition, it has been removed by Representative Tauzin and Chairman Markey.

12/ The Commission also concluded that "any behavior that is tantamount to exclusivity should be prohibited in unserved areas." (Id.).

13/ Without the requisite involvement of a "cable operator," Section 76.1002(c)(1) of the rules simply cannot be violated.

B. An Award of Damages May Be An "Appropriate Remedy" for Violation of the Program Access Rules.

11. Through the language of Section 628(e)(1), Congress conferred upon the Commission expansive authority to impose "appropriate remedies" for violations of the Program Access requirements.[14] Under the broad language of the statute, such remedies may include, but are not limited to, the establishment of prices, terms and conditions for the sale of programming. Congress also made it clear that these remedies "are in addition to and not in lieu of the remedies available under Title V or any other provision of this Act." 47 U.S.C. 547(e)(2).

12. Beyond doubt, the Commission now possesses ample statutory authority to grant an award of damages as an "appropriate remedy" in a particular Program Access case. It is a well established principle that a remedy is the "means employed to enforce a right or redress an injury." Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918). To properly "redress an injury," damages must be awarded to make the aggrieved party whole. As demonstrated in its Petition, NRTC has suffered and continues to suffer significant losses due to the inflated and unjustified rates it is required to pay for programming. It is well within the Commission's discretion to "redress this injury" and, if appropriate, to award compensatory and punitive damages, as well as attorneys fees, to NRTC and to other aggrieved parties for losses suffered at the hands of programmers.

---

[14] "[T]he Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms and conditions of sale of programming." 47 U.S.C. 547(e)(1). (Emphasis added.)

13. Several Commenters have overreacted to NRTC's reference to Title II as an area in which the Commission traditionally has awarded damages.[15] NRTC does not contend that Title II and Section 628 are "the same." Title II is just one example of an area where the Commission in the past has ordered damages as an "appropriate remedy." Similarly, depending on the circumstances, an award of damages could be an "appropriate remedy" for a Program Access violation. Had Congress intended to prohibit an award of damages or to deem such a traditional remedy to be "inappropriate" in Program Access cases, it could and presumably would have done so. Instead, in Section 628(e), Congress conferred expansive powers and wide discretion on the Commission.

14. Lastly, NRTC never requested that the Commission automatically assess damages in every complaint proceeding. Rather, the Commission should retain the discretion to award damages where "appropriate," as directed by the statute. For example, in the event a programmer has engaged in willful, gross or egregious conduct, involving a wide and unjustified disparity in pricing, the Commission clearly should award compensatory and punitive damages to the aggrieved party. At this point, however, the Commission need only preserve its discretion to award damage in the future if "appropriate." The Commission must not hold now that it will never order damages regardless of the circumstances of the violation.

[15] Superstar, for instance, devotes several pages of its Opposition to arguing that Title II proceedings are different than Section 628 proceedings. Superstar Opposition, pp. 12-14.

C. The Commission Must Fully Examine the Cost "Justification" for Discrimination Against HSD Distributors Based on the Specific Facts of Particular Complaints.

15. In its Petition, NRTC expressed concern with several sweeping statements in the First Report and Order suggesting that the services provided by satellite broadcast programming vendors ("satellite carriers") to Home Satellite Dish ("HSD") distributors were more costly than services to other distributors. NRTC argued that the Commission should not pre-judge these types of costing issues, but should resolve them within the context of specific complaint proceedings.

16. Obviously, in light of the Petition and Oppositions, there is a genuine dispute of fact among the parties regarding the cost justification for HSD rates. Although the parties disagree on the facts, however, most seem to agree with the principle that the cost issue must be resolved on an ad hoc basis. As Time Warner stated, "[w]hether a particular HSD distributor has higher (or lower) costs associated with its distribution is a question that will be resolved during the complaint process."[16] We concur. The Commission should make it clear that the resolution of cost justification issues will await the disposition of particular complaint proceedings.

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[16] Opposition of Time Warner, pp. 9-10.

II. <u>CONCLUSION</u>

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Federal Communications Commission to act in accordance with this Reply and to reconsider its First Report and Order in this proceeding as described above.

Respectfully submitted,

NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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Attachment A

BILLY TAUZIN
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June 16, 1993

The Honorable John Sprizzo
United States District Court
Southern District of New York
U.S. Courthouse
Foley Square Room 612
New York, New York 10007

RE: Civil Action No. 93-CIV-____, The States of New York, California, Maryland, et. al. v. Primestar Partners and Civil Action No. 93-CIV-3913, U.S. v. Primestar Partners

Dear Judge Sprizzo:

I am writing you today to express my reservations about the antitrust consent decrees filed by the States' Attorneys General and the U.S. Department of Justice in the Primestar Partners matter. I am concerned with the effect these consent decrees may have on the development of full competition to the cable industry, particularly the impact these decrees will have on the direct broadcast satellite industry (DBS), potentially the most viable competitor to cable.

Last year, the Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. I was the author of the program access amendment to the Act which was adopted on the floor of the U.S. House of Representatives. Section 19 of the Act, the program access provisions, was vigorously debated by the Congress and ultimately emerged as the premier competitive aspect of the Act. Section 19 contained a flat prohibition against discriminatory pricing and prohibited exclusive contracts except in the most limited circumstances and only after the Federal Communications Commission makes a finding that such a contract is in the public interest. It is my understanding that the consent decrees as filed by the States' Attorneys General and the Justice Department undermine both the letter and spirit of the 1992 Cable Act.

In particular, the consent decree filed by the States' Attorneys General permits Primestar Partners to enter into an exclusive contract with a high-power DBS operator at the 101 degree orbital position effectively permitting the Primestar Partners to prevent any other DBS operator at that orbital position from obtaining the programming controlled by Primestar and its partners. This is also true for all other orbital slots. In addition, this subparagraph appears to create not only a ceiling, but a floor for "price, terms, and conditions" by establishing the presumption that an agreement reached with the first high-power DBS provider operating from the 101 degree orbital position is not discriminatory. This pricing provision creates the potential for artificially high pricing, thereby undercutting the benefits to consumers which should flow from increased competition to cable.

I would appreciate time to review these decrees more thoroughly before a final judgment is entered. Therefore, I request that the Court allow interested parties to comment on the agreement reached by both the States' Attorneys General and the Justice Department.

Your consideration in this matter is appreciated.

Sincerely,

Billy Tauzin

BILLY TAUZIN
Member of Congress

BT/dt

Attachment B

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U.S. House of Representatives

Committee on Energy and Commerce

SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE

Washington, DC 20515-6119

July 1, 1993

The Honorable Robert Abrams
Attorney General of the
State of New York
120 Broadway
25th Floor
New York, New York 10271

Dear Bob:

I am writing to follow up conversations with your staff to urge your reconsideration of the proposed consent decree agreed to by the States Attorneys General with Primestar Partners.

Let me begin by congratulating you and your team on pursuing this case with such energy and commitment. Much of the promise of technology hinges on the outcome of the ongoing fight for competitive access to programming. This is not an easy undertaking. As you know, we were able to win the legislative battle in Congress only after four years of struggle and a veto by the President of the United States. Your work on behalf of the Attorneys General to rein in cable's anti-competitive excesses in the courts is a much-needed step toward implementing the goals of the Cable Television Consumer Protection and Competition Act.

Nevertheless, I am concerned that one provision of the decree (Section IV.A.1(g)) may serve to impede our legislative goal of prohibiting cable operators from engaging in unfair methods of competition.

Section 19 of the 1992 Cable Act, one of the most intensely debated and vigorously contested provisions of the law, created a broad prohibition against "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent <u>any</u> multichannel video programming distributor (e.g., a DBS provider) from providing satellite cable programming . . . to subscribers or consumers." [Emphasis added.] Section 19(c)(2)(B) prohibited price discrimination by vertically integrated cable programming companies among cable operators and competitors to cable, subject to enumerated cost-based differences. Section 19(c)(2)(C) prohibits exclusive contracts between vertically integrated cable companies and a cable operator in non-cabled areas, and Section 19(c)(2)(D) prohibits such exclusive contracts in cabled areas unless the FCC finds that they serve the public interest, applying statutorily mandated criteria.

The FCC's implementing regulations, contained in its April 30, 1993 First Report and Order, faithfully carry out Congressional intent. They establish a per se rule barring exclusive contracts between a vertically integrated cable programming company and a cable operator in non-wired areas (para. 59) and require that any exclusive contract between a cable operator and a vertically integrated cable programmer be approved by the FCC as being in the public interest in advance of its becoming effective (para. 67). Moreover, the FCC construes non-price discrimination as falling within Section 19(c) of the Act. The regulations use the example of a vertically integrated cable programming supplier's "'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor." (para. 116) [Emphasis added.]

The regime created by the Cable Act and implementing regulations was intended to promote the broadest possible competition to cable. The Congress and the FCC deemed DBS to be a particularly strong potential competitor.

Section IV.A.1.(a)-(f) of the proposed consent decree among the states and the Primestar Partners is generally consistent with the Cable Act and these regulations. Section IV.A.1(g), however, is not. By sanctioning exclusive contracts between the Primestar Partners (any of the vertically integrated cable programming suppliers) and one of the two DBS providers licensed at the 101° orbital slot, this provision enables the Primestar Partners to divide the DBS market for cable programming between one of the two DBS systems and Primestar, excluding the other major DBS provider at 101°. This arrangement is precisely the type of anticompetitive behavior we legislated against.

Moreover, subsection (g) ratifies the pricing arrangements of the vertically integrated cable programmer and the first DBS provider to sign an agreement with them. This would appear to have the affect of locking in an artificially high price for such programming.

Subsection (g) of the proposed consent decree appears to violate three aspects of the Cable Act, as implemented by the FCC. First, it constitutes an exception to the general prohibition of Section 19(b) against unfair methods of competition . . . the "purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing programming to customers." An exclusive arrangement between vertically integrated cable programmers and one DBS provider, shutting out the other, arguably stronger DBS competitor, would prevent that second DBS provider from offering such programming to its customers. It also runs afoul of the non-price discrimination provisions in Section 19(c) because it would condone a refusal to sell "to a particular distributor when the vendor has sold its programming to that distributor's competitor." (See para. 116 of the FCC's Report and Order). Finally, if the pricing of the exclusive contract between the first DBS operator and a vertically integrated programmer is higher than comparable rates charged to cable operators, it enshrines a pricing term at odds with Section 19(c)(2)(B) of the Act.

These concerns are not theoretical. Based upon information and belief, Primestar Partners and one of the 101° DBS licensees have already concluded agreements which have exclusivity provisions and are at rates that are higher than cable rates.

I urge you to review the states' position on this proposed decree. It would be very unfortunate if a decree containing so much that is good included language that sanctioned behavior by certain cable companies that Congress fought so hard to outlaw.

Sincerely,

Ed

Edward J. Markey
Chairman

cc: The Honorable Scott Harshbarger, Attorney General
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July 16, 1993

BY HAND DELIVERY

The Honorable John E. Sprizzo
United States District Court for the Southern District of New York
U.S. Courthouse
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New York, New York 10007

Re: State of New York, et al., v. Primestar Partners L.P., et al., Civil Action No. 93-CIV-3638 (JES)

Dear Judge Sprizzo:

Pursuant to the Court's Order of June 17, 1993, we are filing today the Joint Amicus Curiae Memorandum of Law of DirecTv, Inc., the National Rural Telecommunications Cooperative, the Consumer Federation of America, and the Television Viewers of America. These amici curiae respectfully request this Court therein to either reject the proposed Consent Judgments in the above-captioned action, or to condition its approval on certain modifications.

For the convenience of the Court, we are also filing with our brief three appendices containing copies of sources which may be difficult for the Court to obtain readily, such as the Federal Communications Commission's rules addressing access to cable programming, recently promulgated pursuant to the Cable Television Consumer Protection and Competition Act of 1992.

Finally, because of page limitations, we have not cited or included testimony to support certain factual assertions made in the brief, but stand ready to do so should the Court so desire.

The amici greatly appreciate the opportunity to present their objections to the proposed settlement. Thank you for your consideration.

Respectfully submitted,

Gary M. Epstein /lw

Gary M. Epstein
of LATHAM & WATKINS

Attorneys for DirecTv, Inc.

Enclosures

cc: Counsel for all parties (with encl.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK, et al.,	:	
Plaintiff(s),	:	
v.	:	No. 93 Civ. 3868 (JES)
PRIMESTAR PARTNERS L.P., et al.:	:	
Defendants.	:	

RECEIVED 7/16/93

**JOINT AMICUS CURIAE
MEMORANDUM OF LAW OF DirecTv, INC.,
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TABLE OF AUTHORITIES

CASES PAGE(S)

In re Montgomery County Real Estate Antitrust Litigation,
452 F. Supp. 54 (D. Md. 1978) 4, 18

In re Panasonic Consumer Electronics Products Antitrust Litigation,
1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989) 4

Montgomery County Real Estate Antitrust Litigation,
83 F.R.D. 305 (D. Md. 1979) 5

Patterson v. Newspaper and Mail Deliverors' Union,
384 F. Supp. 585 (S.D.N.Y. 1974) 5

Red Lion Broadcasting v. FCC,
395 U.S. 367 (1969) 3

State of New York v. Dairylea Cooperative, Inc.,
547 F. Supp. 306 (S.D.N.Y. 1982) 4, 5, 22, 23

States of New York and Maryland, et al. v. Nintendo of America, Inc.,
775 F. Supp. 676 (S.D.N.Y. 1991) 4

State of New York v. Primestar Partners, L.P. et al.,
93 Civ. No. 3868 (S.D.N.Y. June 9, 1993) 1

United States v. American Telephone and Telegraph Co.,
552 F. Supp. 131 (D.D.C. 1982) 5, 23

United States v. Associated Milk Producers, Inc.,
394 F. Supp. 29 (W.D. Mo. 1975) 5

United States v. GTE Corp.,
603 F. Supp. 730 (D.D.C. 1984) 5

United States v. Hooker Chemical and Plastics Corp., 607 F. Supp. 1052 (D.C.N.Y. 1985) . . . 5

United States v. Ketchikan Pulp Co., 430 F. Supp. 83 (D. Alaska 1977) . . . 5

United States v. Primestar Partners, L.P., et al., No. 93-Civ-3913, 58 Fed. Reg. 33,948 (June 23, 1993) . . . 1

United States Satellite Broadcasting Co. and Hughes . . Communications Galaxy, Inc., 7 FCC Rcd 7247 (1992) . . . 7, 8

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15 U.S.C. § 15c(c) . . . 4

47 U.S.C. § 628 . . . 11, 12, 19, 21

58 F.R. 34,800 (June 23, 1993) . . . 12

138 Cong. Rec. H6533 (daily ed. July 23, 1992) . . . 9

Cable Television Consumer Protection and Competion Act of 1992, Public Law 102-385, 102d Cong., 106 Stat.1460 (Oct. 5, 1992) . . . 4, 6, 10, 19

House Committee on Energy and Commerce, H.R. Rep. No. 102-268, 102d Cong., 2d Sess. (1992) . . . 6, 7, 9

Senate Committee on Commerce, Science & Transportation, 102d Cong., 1st Sess. (1991) . . . 10, 15

OTHER

1990 Cable Report, 5 FCC Rcd 4962 (1990) . . . 7, 9, 10

Abrams Announces Settlement With Cable Television Industry, Press Release (June 9, 1993) . . . 12

Competitive Impact Statement, 58 Fed. Reg. 33,948 (June 23, 1993) . . . 1, 7, 10, 11

In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programmming Distribution and Carriage, First Report and Order, MN Docket No. 92-265 (released April 30, 1993) . . . . passim

Leland Johnson and Deborah R. Castleman, Direct Broadcast Satellites: A Competitive Alternative to Cable Television, R-4047-MF (Rand 1991) 7

I. PRELIMINARY STATEMENT

This case arises from the cable industry's monopolization of the multichannel video distribution market. By engaging in widespread unfair and discriminatory practices against emerging Multichannel Video Programming Distributors ("MVPDs")[1] the cable industry has denied to consumers the benefits of competition and the ability to receive a wide variety of programming from diverse sources.

On June 9, 1993, forty States and the Justice Department filed proposed consent decrees (the "Decrees")[2] in this Court to settle antitrust lawsuits which sought to "enjoin, restrain and remedy monopolistic and anticompetitive conduct" within the multichannel video distribution industry.[3] The lawsuits arise from an antitrust investigation into the formation of Primestar Partners, L.P. ("Primestar"), a medium-power direct broadcast satellite ("DBS") multichannel pay television service[4] founded by seven of the

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1. MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, MM Docket No. 92-265 (released April 30, 1993), at 3, ¶ 6 n.3 ("Program Access Order"). For the convenience of the Court, the full text of the Program Access Order appears at Appendix 1.

2. Three Decrees were filed in the actions brought by the States: 1) the Primestar Decree; 2) the Viacom Decree; and 3) the Liberty Media Decree. The Liberty Media Decree is actually styled as an "Agreement." It is unclear whether it has been or will be submitted to this Court. In any event, it is an integral part of the settlement "package" and its contents are highly relevant. The operation of the three Decrees is explained in more detail below.

3. State of New York v. Primestar Partners, L.P. et al., Complaint, 93 Civ. No. 3868 (S.D.N.Y. June 9, 1993), at ¶ 1.

4. Medium-power DBS service utilizes a medium-power satellite, which can transmit to a dish between 2.5-5 feet in diameter and can be installed more cheaply than larger television receive-only ("TVRO") dishes. Medium power DBS was seen as a potential advance over lower power TVRO service in terms of being more competitive with cable. Primestar is presently the only operating medium-power DBS service. See United States v. Primestar Partners, L.P., et al., No. 93-Civ-3913, Competitive Impact Statement, 58 Fed. Reg. 33,948 (June 23, 1993) ("Competitive Impact Statement").

nation's ten largest cable system operators, also known as multiple system operators ("MSOs").

Some of these cable MSOs possess substantial ownership interests in the leading suppliers of video programming, such as HBO, Showtime, Cinemax and MTV. Both the States and the United States alleged, inter alia, that Primestar and its cable owners conspired to delay, hinder and preempt entry by other firms into the multichannel video distribution market by restricting access to the programming that certain of these defendants control. Thus, the States' Complaint alleges that the MSO defendants "monopolized, attempted to monopolize, combined and conspired to monopolize and restrained trade in the delivery of multichannel subscription television programming to consumers." Complaint at ¶ 1.[5] The Complaint alleges that they designed and structured their DBS venture in order to reduce the potential for direct competition with the defendant MSOs' cable systems and undermine the ability of any cable competitive DBS service to develop."[6]

Pursuant to an Order dated June 17, 1993, this Court granted amici curiae leave to object to the proposed consent judgments. DirecTv, Inc. ("DirecTv"),[7] the

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5. The suit alleges that cable companies exercised their monopoly power to deny alternative MVPDs access to programming outright, or made it available only at discriminatory prices. Complaint at ¶¶ 40, 43-44, 50. The suit further alleges that the cable defendants formed the Primestar partnership, bought rights to a communications satellite, and set up a sham DBS system in an effort to "suppress and eliminate DBS competition in the delivery of multichannel subscription television programming," Complaint at ¶ 52.

6. Complaint at ¶ 58.

7. DirecTv will launch, in December of this year, the first high-powered U.S. DBS satellite, and shortly thereafter will introduce to American consumers the first truly competitive service to cable television. As a high-power DBS provider, DirecTv will provide approximately one hundred and fifty channels of high quality subscription and pay-per-view video programming to the public.

National Rural Telecommunications Cooperative ("NRTC")[8] the Consumer Federation of America ("CFA")[9] and the Television Viewers of America, Inc. ("TVA")[10] have joined in objecting to the proposed Decrees. All amici curiae herein have a direct interest in furthering both competition and consumer protection in the multichannel video distribution industry.

The Decrees should be rejected, or their approval conditioned on their modification, for two reasons. First, although the Decrees are a significant part of the government's efforts to structure the MVPD industry, they neither benefit consumers nor protect competition. The Decrees compromise the MSO defendants' purported obligations to provide fair, reasonable and nondiscriminatory access to programming with a host of exceptions that benefit and entrench the MSOs. The advantages thus conferred on the MSOs

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8. NRTC is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 sates. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis. On April 10, 1992, NRTC signed a DBS Distribution Agreement with HCG to provide DBS services to rural subscribers across the country. Under the DBS Distribution Agreement, HCG provides NRTC, its members and affiliated companies the satellite capacity and other necessary services to market and distribute 20 channels of popular cable programming services to rural households equipped with 18" DBS receiving antennas. Most of the programming services to be offered are owned or controlled by cable companies.

9. CFA is the nation's largest consumer advocacy group, composed of more than 240 state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power, and cooperative organizations, with more than 50 million individual members. CFA was the lead representative of the public in the legislative deliberations that led to the 1992 Cable Act. The millions of television viewers and cable consumers who constitute CFA's affiliates' members have a "paramount" First Amendment right to receive a variety of information from diverse sources, Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969), and have been undeniably harmed by the power that the cable industry has acquired and historically exercised to dominate the MVPD marketplace. CFA is therefore critically concerned with the anticompetitive and anti-consumer effects of the proposed Decrees on the public interest.

10. With members in 19 states and the District of Columbia, Television Viewers of America is a grassroots, non-profit, public interest consumer organization devoted, inter alia, to competition in multi-channel television delivery. Founded in 1991, TVA was active in the legislative struggle which resulted in the Cable Television Consumer Protection and Competition Act of 1992.

will make it very difficult for any MVPD to compete with them. Second, the Decrees undercut the pro-competitive policies of the government's companion effort to structure the MVPD industry, the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102-385, 102d Cong., 106 Stat. 1460 (Oct. 5, 1992) (the "Act"). The Decrees provide for far less competition than mandated by the Act, and position the cable industry to argue that the Act's competition requirements can and should be construed in accordance with the narrow provisions of the Decrees. It is not in the public interest for antitrust decrees to be used to structure an industry anticompetitively, particularly if they would impose a scheme that contravenes the pro-competitive statutory and regulatory structure that governs the industry.

II. THE COURT'S POWER TO REJECT THE PROPOSED CONSENT DECREES, OR TO REQUIRE MODIFICATION AS A CONDITION OF APPROVAL, IF THEY FAIL TO SERVE THE PUBLIC INTEREST

The antitrust actions from which the Decrees arise were brought by the State Attorneys General as parens patriae pursuant to the Clayton Act. See Complaint ¶¶ 2, 6. As such, they cannot be settled "without the approval of the court." 15 U.S.C. § 15c(c).[11]

In reviewing a proposed settlement of a parens patriae action, courts examine the proposed decrees to ensure that they are "fair, reasonable and adequate."[12] This inquiry involves the court in reviewing whether the proposed settlement "violates public policy," Panasonic, 1989-1 Trade Cas. (CCH) ¶ 68,613, at 61,244 (citing Dairylea Cooperative, 547 F. Supp. at 307-08), i.e., whether the public interest in competition has

11. Section 15c's requirement of court approval applies to actions for injunctive relief as well as to damage actions. See In re Montgomery County Real Estate Antitrust Litigation, 452 F. Supp. 54, 57-60 (D. Md. 1978).

12. See States of New York and Maryland, et al. v. Nintendo of America, Inc., 775 F. Supp. 676, 680 (S.D.N.Y. 1991); In re Panasonic Consumer Electronics Products Antitrust Litigation, 1989-1 Trade Cas. (CCH) ¶ 68,613, at 61,243 (S.D.N.Y. 1989); State of New York v. Dairylea Cooperative, Inc., 547 F. Supp. 306, 307-08 (S.D.N.Y. 1982).

been addressed fairly and adequately by the proposed settlement, and whether competition may be adversely affected by the settlement. See, e.g., Dairylea Cooperative, 547 F. Supp. at 307-08; see also Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. at 315.[13] If the interests of the public are not served by the terms of the settlement, the Court may exercise its discretion to reject or to approve the proposed decrees conditionally subject to certain modifications.[14]

III. THE MVPD AND DBS INDUSTRIES, THE PROGRAM ACCESS PROVISIONS OF THE CABLE ACT AND AN OVERVIEW OF THE PROPOSED DECREES

A. The MVPD And DBS Industries

MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming."[15] Cable television operators, who transmit programming via wires directly to the home, have been the predominant type of MVPD. As Congress found in passing the Act:

> There has been a substantial increase in the penetration of cable television systems over the past decade. Nearly 56,000,000 households, over 69 percent of the households with televisions, subscribe to cable television, and this percentage is almost certain to increase. As a result of this growth, the cable

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13. The Court's public policy inquiry is particularly important where, as here, the interests affected by the proposed decrees "are far broader than those of the particular parties in a particular lawsuit." Patterson v. Newspaper and Mail Deliverors' Union, 384 F. Supp. 585, 588 (S.D.N.Y. 1974). In such cases, where significant public interests are at stake, the Court must "determine whether the decree adequately protects the public interest and is in accord with the dictates of Congress." United States v. Hooker Chemical and Plastics Corp., 607 F. Supp. 1052, 1057 (D.C.N.Y. 1985); see United States v. Ketchikan Pulp Co., 430 F. Supp. 83, 86 (D. Alaska 1977) (same, where "court is asked to enter a judgment which clearly will have an effect on the public").

14. See, e.g., Dairylea Cooperative, 547 F. Supp. at 307-08; see also United states v. GTE Corp., 603 F. Supp. 730, 753 (D.D.C. 1984); United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 216 (D.D.C. 1982); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 40 (W.D. Mo. 1975).

15. Program Access Order at 3, ¶ 6 n.3.